IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

L.Rs. of Surya Prakash vs. L.Rs. of Smt. Mananawati & anr.

S.B.Civil Second Appeal No.69/89 under Section 100,C.PC. against the judgment and decree dated 5.4.1989 passed by the District Judge, Sirohi in Civil Appeal Decree No. 58/75.

Date of Judgment: November 16, 2005

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr.K.C. Samdaria, for the appellant
Mr.S.N. Trivedi, for the respondents

BY THE COURT:

This appeal is against the judgment and decree passed by the first appellate court dated 5.4.1989 as the first appellate court after reversing the judgment and decree of the trial court dated 28.2.1975, decreed the suit for eviction of the defendant-tenant from the premises in dispute.

Brief facts of the case are that plaintiff Smt. Maganawati filed a suit for eviction on 1.2.1973 against his tenant-defendant Surya Prakash on the allegation that the suit premises was let out to the said defendant-tenant Surya Prakash on rent of Rs.32/- per month. The suit premises is required for the personal bonafide need of the plaintiff

herself and for the necessity of her family members. According to the plaintiff, at that time she had four sons, out of which two were married. One of the son of the plaintiff had two sons. Three daughters of the plaintiff were residing with the plaintiff at that time. The plaintiff herself was living in a rented house at the time of filing of the suit. The plaintiff also pleaded that she had 13 members in her family and she wanted to live in her own house. It will be worthwhile to mention here that ground-floor of the house was let out to one Mitha Lal but during the pendency of the first appeal, said Mitha Lal vacated the ground floor of the house and the plaintiff got possession of the house of of ground floor on 21.4.1988. This fact was taken on record on application of the defendant filed under Order 41 Rule 27, C.P.C. After taking on record this fact also, the first appellate court held that the plaintiff's need is bonafide and she is entitled for decree for possession of the house in dispute. It appears that during the pendency of the first appeal, the original defendant Surya Prakash expired and his legal representatives were taken on record. In this appeal one of the grounds for challenge to the judgment and decree of the first appellate court is that one of the legal representatives of deceased Surya Prakash-tenant, namely, Smt. Sushila Devi was not served with the notice of the appeal, therefore, a substantial question of law was framed by this Court on 4.7.1989 to the effect that whether the defendant-respondent Sushila Devi was served

with the notice of the first appeal ? If not so, to what effect ?. The another ground of challenge is that whether the first appellate court ignored material and important evidence and also misread the evidence while recording the finding on reasonable and bonafide necessity and comparative hardship and, therefore, this was framed as substantial question of law no.2. Substantial question of law no.3 is to the effect that whether the decree for ejectment passed by the first appellate court is sustainable despite the fact that it did not consider and decide the question of partial eviction as required under the proviso of sub-section 2 of Section 14 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1958 .

The learned counsel for the appellants submitted that from the record it is clear that notice of the appeal was not served on Sushila Devi w/o Nemi Chand, despite the fact that she was impleaded as respondent, being legal representative of defendant (sole respondent Surya Prakash). In view of the above, the decree has been passed without affording opportunity of hearing to one of the L.Rs. of deceased tenant, hence it is nullity. The learned counsel for the appellant also submitted that the first appellate court committed serious error of law as the first appellate court ignored material facts and important evidence and also misread the evidence while recording finding on personal bonafide necessity and comparative hardship. According to the

learned counsel for the appellants, it has been held by the Hon'ble Apex Court that even when there is no pleading of any defence of the defendant even then it is the duty of the court to look into the aspect whether need of the plaintiff can be satisfied by passing the decree for part of the premises only and that has not been done by the first appellate court. Therefore, the decree is contrary to law.

The learned counsel for the respondents vehemently submitted that the learned counsel filed power on behalf of almost all the respondents who are legal representatives and who are in number 12 in total of deceased Surya Prakash except power on behalf of Smt.Sushila Devi. The learned counsel appearing on behalf of the legal representative of sole respondent argued the appeal on merits and the present appeal has been filed by all the legal representatives except Smt.Sushila Devi, therefore, in fact, the appeal is preferred by these persons and opportunity of hearing has been given and has not been preferred by Smt.Sushila Devi for whom it is said that notice was not served. When Smt. Sushila Devi has no grievance against the judgment and decree then the appellants have no right to challenge the judgment and decree which has been passed after hearing them. According to the learned counsel for the respondents, the first appellate court recorded the finding of fact after giving lawful reasons that too, after appreciation of the evidence, therefore, the finding recorded on issue

of fact is binding upon this Court, otherwise also, neither there is a case of ignoring material or important evidence nor it is a case of misreading of evidence on the question of personal bonafide necessity of the plaintiff. The learned counsel for the respondents pointed out various facts from the impugned judgment to demonstrate that the finding of fact is based on lawful evidence. It is also submitted that in view of the fact that all evidence are available on record which suggest that need of the plaintiff cannot be satisfied by eviction of tenant from the part of the premise, even if the fact of keeping possession of the ground-floor from another tenant of the respondent-landlord is taken into account.

I considered the submissions of the learned counsel for the parties and perused the record of the first appellate court also. It appears that sole respondent-defendant-tenant expired on 2.11.1983. An application was submitted by advocate of the respondent stating therein that Smt. Sushila Devi is residing at America and the learned counsel has not received *Vakalatnama* from Smt. Sushila Devi but he has received instructions from said Smt.Sushila Devi. This application was submitted before the first appellate court on 21.10.2002. There appears no reason for disbelieving the learned counsel who appeared for all the respondents who are the legal representatives of sole respondent-tenant. In view of the above fact, there was no need of sending any notice of appeal to said Smt.Sushila Devi. Otherwise also, it is clear

from the facts that the sole defendant-respondent Surya Prakash left behind as many as 12 legal representatives and all appeared through advocate before the first appellate court, therefore, estate of the deceased Surya Prakash was fully represented in the first appellate court.

In view of the above reasons, it is held that Smt.Sushila Devi had notice of the appeal in view of the fact that the learned Advocate gave in writing before the first appellate court that he has instructions from Smt. Sushila Devi. So far as substantial question no.2 is concerned, this court has no hesitation after going through the reasons given by the first appellate court in passing decree and judgment dated 5.4.1989, that the first appellate court considered the evidence of the parties in detail and found that the plaintiff sought possession of the two rooms, one kitchen, one latrine whereas she pleaded that she had 13 members in her family. The plaintiff was residing in a rented house. She got the possession of the portion of the house from her tenant Mitha Lal on 21.4.1988 which consists of two rooms, one kitchen, one chowk, one bathroom, one latrine for living purpose. In these facts, the need of the plaintiff cannot be said to be tinted with any ill-motive. The finding is not based on no evidence or result of ignoring of any material evidence or misreading of evidence. Therefore, substantial question no.2 is decided against the appellant. The details of the total accommodation available in the

house may be of two storied building but looking to the total number of the family members of the plaintiff, there was hardly any reason for the first appellate court to remand the matter to the trial court for deciding the question of partial eviction and no case is made out by the appellants for justifying remand by this Court after setting aside decree of the first appellate court in a case where the suit for eviction was filed in the year 1973 and was decreed by the first appellate court in the year 1989, in a case where the plaintiff filed the suit on the ground of personal bonafide necessity and for expanding the family. The substantial question no.3 is therefore, decided against the appellants.

The learned counsel for the appellants at this stage prayed that the appellant may be given reasonable time to vacate the house in dispute because the appellants who are residing in the house since long and having a large family, will have to make suitable arrangements for their residence. The learned counsel for the respondents vehemently submitted that there is no reason for giving any time to the appellants for vacating the house because the need of the plaintiff-respondents is grave.

Looking to the facts and circumstances of the case, it will be just and proper to grant time to the appellants to vacate the house in dispute. The appellants are allowed to occupy the house in dispute till 30.11.2006 on the condition that the appellants shall submit a written

undertaking within one month from today that they shall vacate the house and hand over possession of the house in dispute to the respondents-landlords by or before 1.12.2006 and shall pay all the arrears of rent if due and shall also pay the rent month by month to the respondents-landlord by 15th day of each succeeding month of their tenancy or shall deposit the rent in the court month by month. In case of default and non-compliance of this order, the decree shall become executable forthwith. In case this order is complied with then the decree shall not be executed till 1.12.2006.

The appeal of the appellants is, therefore, dismissed with above concession.

(PRAKASH TATIA),J.

mlt.